

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 5, 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

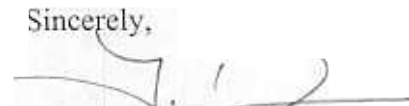
RE: Docket No. 458-07-3278/Texas Alcoholic Beverage Commission vs. Kim Van Thi Le d/b/a J. K. Icehouse & Grill

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Timothy Horan
Administrative Law Judge

TJH/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Lindy Hendricks, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Cory M. Krueger, Attorney for Respondent, 24 Greenway Plaza, Suite 1822, Houston, Texas, 77045- VIA REGULAR MAIL

SOAH DOCKET NO. 458-07-3278

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**
Petitioner

V.

KIM VAN THI LE,
d/b/a J. K. ICEHOUSE & GRILL,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Kim Van Thi Le d/b/a J. K. Icehouse & Grill (Respondent), alleging that on or about November 19, 2005, the Respondent, or its agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person, in violation of the Texas Alcoholic Beverage Code (Code). TABC recommended the Respondent's permits/licenses be suspended for 20 days, or in lieu of any suspension, the Respondent pay a civil penalty in the amount of \$3000.00. The Administrative Law Judge (ALJ) recommends the Respondent's permits/licenses be suspended for a period of 5 days, or in lieu of any suspension, the Respondent pay a civil penalty in the amount of \$750.00 in consideration that the cause at issue is Respondent's first violation of the Code.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 §§ 11.61 and 61.71. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On June 25, 2007, Petitioner issued its notice of hearing directed to the Respondent. On August 7, 2007, a Motion for Continuance was filed and the case was reset to October 5, 2007, at

10:00 a.m. The hearing was conducted before SOAH ALJ Timothy Horan at 2020 North Loop West, Suite #1 Houston, Texas. The Petitioner was represented at the hearing by Lindy Hendricks, TABC Staff Attorney. Attorney Cory Krueger represented the Respondent. The hearing adjourned that same day, but the record was open until October 12, 2007, to allow the parties an opportunity to file briefs or submit case law.

II. DISCUSSION

A. Applicable Law

The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found that the licensee sold or delivered an alcoholic beverage to an intoxicated person. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (6).

B. Evidence

1. Petitioner's Evidence

a. Roland Garza

Roland Garza, an Enforcement Agent for TABC for the past 25 years, testified that on November 19, 2005, he conducted an investigation of the Respondent's premises located at 3130 S. Main, Stafford, Fort Bend County, Texas, to check for compliance with the Texas Alcoholic Beverage Code.

Agent Roland Garza testified that while undercover, he entered the Respondent's establishment at 9:20 p.m. and saw a man, later identified as Pablo Vasquez, standing at the bar drinking a beer. During his initial observation, Mr. Vasquez exhibited very slow movements,

unsteady balance, swayed back and forth, and put his head down on the bar. Agent Garza identified the bartender as the Respondent, Kim Van Thi Le, from his previous visits to the bar. He observed her serve Mr. Vasquez another beer. Agent Garza has been in law enforcement for over 25 years and testified that he is experienced in identifying intoxicated persons. He visually observed Pablo Vasquez at the bar for 15-20 minutes and according to Agent Garza, Mr. Vasquez did not appear to have the normal use of his mental and physical faculties. Agent Garza, testified Mr. Vasquez appeared intoxicated and that the bartender should have been able to observe the same signs of intoxication that Garza had observed of Mr. Vasquez. Agent Garza then left the bar and gave TABC agents the description of the man at the bar for further investigation.

b. Sergeant Joe Cavazos

Sergeant Joe Cavazos testified that he is an agent for TABC and has been employed with the agency for over nine years. On November 19, 2005, Sergeant Cavazos was working in an open capacity along with TABC Agent Roland Garza, who was undercover. Agent Garza contacted Sergeant Cavazos and informed him of the situation inside the club. Agent Garza earlier had provided Sergeant Cavazos with a physical description of the man at the bar. Sergeant Cavazos entered the club and observed Pablo Vasquez at the bar. He observed that Mr. Vasquez had very slurred speech, red bloodshot eyes, breath smelling of an alcoholic beverage, and swayed very badly. He administered the Horizontal Gaze Nystagmus Test (HGN), which is a field sobriety test, and Mr. Vasquez exhibited 6 clues. Sergeant Cavazos testified that these clues indicated intoxication. Sergeant Cavazos testified that in his opinion, Pablo Vasquez did not have the normal use of his mental and physical faculties due to his intoxicated condition.

2. Respondent's Evidence

a. Delores Jaloma

Ms. Jaloma, a regular at the Respondent's bar, was at the premises on November 19, 2005

and has known Pablo Vasquez for about 4 years. She saw him enter the bar and observed his arrest thirty minutes after he had entered the premises. Ms. Jaloma said it is not unusual to see Mr. Vasquez close his eyes and dance to music and that he always stands at the bar. According to Ms. Jaloma, Mr. Vasquez exhibits this same behavior while “sober or feeling good when he is drinking.

b. Ricardo “Red” Artuga

Mr. Artuga testified that he was at the Respondent’s bar on the night in question and was arrested along with Mr. Vasquez for public intoxication.

c. Manuel Quellar

Mr. Quellar is the ‘DJ’ at the club and was present the night TABC arrested Mr. Vasquez for public intoxication. He testified he knows Mr. Vasquez from the club and has seen him walk on numerous occasions. Mr. Quellar stated that Mr. Vasquez walks from side to side and almost waddles while he walks. He was not able to say whether or not Mr. Vasquez was intoxicated while at the bar on November 19, 2005.

C. Discussion and Recommendation

The only issue in this case is whether Mr. Vasquez was intoxicated when he was served the beer. The evidence in this case establishes that the Respondent, Kim Van Thi Le, was the bartender at J.K. Icehouse & Grill on November 19, 2005, who served and sold an alcoholic beverage to an intoxicated person.

While undercover, Agent Garza observed that Mr. Vasquez was unsteady, swayed back and forth, and exhibited very slow movements while standing at the bar. Sergeant Cavazos observed Mr. Vasquez to have an odor of alcohol on his breath, slurred speech, red bloodshot eyes, and stated

that he swayed from side to side. Sergeant Cavazos administered the Horizontal Gaze Nystagmus Test (HGN) and observed 6 clues. The clues, according to Sergeant Cavazos, indicated intoxication. Both agents testified that Pablo Vasquez did not have the normal use of his mental and physical faculties due to intoxicated state. The testimony of Sergeant Cavazos corroborated Agent Garza's observations and opinion that Pablo Vasquez was intoxicated. Both TABC agents have years of experience in identifying intoxicated individuals and both testified that Mr. Vasquez exhibited behavior which would lead them to believe that he was intoxicated on the night of November 19, 2005 while drinking a beer at the Respondent's bar.

The evidence on the record is sufficient to establish that the Respondent served an alcoholic beverage to an intoxicated person in violation of § 61.71 (a) (6) of the Code. Because this is the first violation of the Code committed by the Respondent, the ALJ recommends that the Respondent's licenses/permits be suspended for a period of 5 days, or in lieu of any suspension, that the Respondent pay a civil penalty in the amount of \$750.00.

III. FINDINGS OF FACT

Kim Van Thi Le d/b/a J.K. Icehouse & Grill (Respondent) holds Wine and Beer Retailer's Permit, BG-403382, which includes the Retail Dealer's On-Premise Late Hours License, issued by the Texas Alcoholic Beverage Commission (Petitioner) for the premises located at 3130 S. Main, Stafford, Fort Bend County, Texas.

- 2 On November 19, 2005, at approximately 9:20 p.m., Agent Garza observed the Respondent, Kim Van Thi Le, serve a beer to Pablo Vasquez, a patron in the Respondent's establishment.
- 3 At that time, Mr. Vasquez exhibited signs of intoxication. Specifically, Agent Garza observed that Pablo Vasquez had unsteady balance, slow movements, swayed back and forth, and put his head down at the bar. Sergeant Cavazos observed that Mr. Vasquez had slurred speech, red bloodshot eyes, the odor of an alcoholic beverage on his breath, and swayed very badly. Sergeant Cavazos administered a field sobriety test, specifically, the Horizontal Gaze Nystagmus Test (HGN). Sergeant Cavazos observed Mr. Vasquez to have 6 clues which indicated intoxication.
4. On June 25, 2007, the Petitioner sent a notice of hearing by certified mail, return receipt

requested, to Respondent's mailing address as listed in the Commission's records, informing the Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.

5. The hearing on the merits convened October 5, 2007, at the State Office of Administrative Hearings, 2020 North Loop West, Suite # 111, Houston, Texas, before ALJ Timothy Horan. Petitioner was represented by TABC Staff Attorney, Lindy Hendricks. The Respondent was represented by attorney Cory Krueger. The record closed on October 12, 2007.

IV. CONCLUSIONS OF LAW

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 61.71.

2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
4. Respondent violated TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (6).
5. Respondent's permits/licenses should be suspended for a period of 5 days, or in lieu of any suspension, the Respondent pay a civil penalty in the amount of \$750.00.

SIGNED December 5, 2007.


TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS